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In the Supreme Court of the United States

OCTOBER TERM A.D. 1972

72-279

VERNON J. KNOX,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for a Writ of Certiorari to the Illinois Appellate Court, First District.

PETITION FOR WRIT OF CERTIORARI

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Petition for a Writ of Certiorari to the Illinois Appellate Court, First District.

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner Vernon J. Knox by his attorneys, Thomas P. Sullivan and Chester T. Kamin, respectfully requests that this Court grant a petition for writ of certiorari.

The first opinion of the Illinois Appellate Court in this case is reported at 90 Ill.App.2d 149 (1st Dist. 1967). The second opinion of the Illinois Appellate Court, affirming the

judgment of conviction and reinstating the original sentence, of which review is presently sought, is reported at 3 Ill.App.3d 22 (1st Dist. 1971). The latter opinion is set forth in the Appendix.

JURISDICTION

The judgment of the Illinois Appellate Court was entered on December 1, 1971. A petition for rehearing of the decision of the Appellate Court was denied by that court on January 5, 1972. A petition for leave to appeal to the Illinois Supreme Court pursuant to Rules 315 and 612 of the Rules of the Supreme Court of Illinois was denied on March 29, 1972. A petition for reconsideration of that denial was denied on May 11, 1972. On August 7, 1972, Mr. Justice Rhenquist entered an order extending the time within which to file this petition to and including August 24, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

QUESTION PRESENTED

Whether petitioner was denied due process when he was denied the opportunity to be heard on the issue of sentence and probation at a hearing for imposition of a new sentence following remandment and vacation of the original judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Sec. 1:

> "No state shall . . . deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

After a jury trial petitioner was convicted of larceny. At the trial, the court denied petitioner's motion to hold a hearing on the voluntariness of inculpatory statements made by petitioner.

Prior to the hearing on sentence, petitioner did not move for probation.* A hearing in aggravation and mitigation was held, and on February 28, 1964, petitioner was sentenced to serve a term of two to five years in the penitentiary.

On appeal, the Appellate Court remanded with directions to vacate the judgment of conviction and conduct a hearing on the voluntariness of the confession. The mandate of the Appellate Court provided that if the confession was determined to be voluntary, the trial court "shall enter a new judgment and sentence in accordance with the verdict of the jury." 90 Ill.App.2d at 167.

On remand, the court determined the statements to be voluntary. Petitioner moved for probation pursuant to Ill. Rev.Stat. 1967, ch. 38, §117-1, but the court denied the motion on the ground that it was without authority to consider the motion, "the mandate of the Appellate Court being what it is." (A. 9).** On January 3, 1969, the court held a hearing on sentence, termed a hearing on aggravation and mitigation under Illinois law. Ill. Rev. Stat. 1967, ch. 38, § 1-7(g). In mitigation of sentence, the

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* At the time state law was unclear whether admission to probation forfeited, or delayed, defendant's right to appeal from the judgment of guilty. See *People* v. *Nordstrom*, 73 Ill.App.2d 168, 173-77 (2d Dist. 1966), *People* v. *Sims*, 32 Ill.2d 591, 595 (1965).

** References are to the abstract filed in the Supreme Court of Illinois with petitioner's petition for leave to appeal.

petitioner testified that he had been admitted to the bar of the Supreme Court of Illinois in 1934, and that during the five year period following his conviction petitioner had stable residence, family ties and employment, had voluntarily withdrawn his name from the roll of attorneys subsequent to his conviction, had not been arrested (excluding minor traffic offenses) and had made arrangements for restitution. The state presented evidence in aggravation. The Court, with the same judge presiding as at the original sentence of two to five years, thereupon sentenced petitioner to a term of one to four years in the penitentiary. (A. 5-6.)

Petitioner appealed, arguing solely that the court erred in refusing to consider his motion for probation. In its brief, the state argued that the denial of probation was a proper exercise of the court's discretion on the merits of the issue and stressed that the court had shown leniency in entering a sentence for a term shorter than originally imposed. (Brief of Plaintiff-Appellee in No. 54118, pp. 8-9.) The state did not cross-appeal the imposition of the new, lighter sentence, did not argue that the court erred in imposing the new sentence, and did not contend that the court was correct in refusing to hold a hearing on probation.

However, the Appellate Court, through a different division than that originally considering the case, not only affirmed the refusal of the trial court to entertain the motion for probation but also reversed the imposition of the new sentence of one to four years and reinstated the original sentence of two to five years. The Appellate Court held that the trial court "erred in holding a hearing on aggravation and mitigation and in changing the sentence previously imposed on defendant." 3 Ill. App. 3d 22, 24, Appendix, *infra* p. 3.

A petition for rehearing of the decision of the Appellate Court was denied by that Court on January 5, 1972. A petition for leave to appeal to the Illinois Supreme Court pursuant to Rules 315 and 612 of the Rules of the Supreme Court of Illinois was denied without opinion on March 29, 1972. A petition for reconsideration of that denial was denied without opinion on May 11, 1972. The federal question was explicitly raised in the Illinois Supreme Court in the petition for reconsideration of the denial of the petition for leave to appeal.

REASONS FOR GRANTING THE WRIT

This petition presents an important and recurring question concerning the right of the accused to be heard on the issue of sentence. Specifically, this petition involves a determination of the due process rights of a defendant who affirmatively seeks, and is denied the right, to offer evidence in mitigation of his sentence.

This Court has long recognized that the sentencing judge should seek complete information to aid in the imposition a wise and fair sentence and that, since sentencing is a critical stage of the proceeding affecting important rights and liberties, constitutional safeguards are at hand. In *Williams* v. *State of New York*, 337 U.S. 241 (1949), this Court held that a sentencing judge has wide discretion in the sources and types of evidence employed in an attempt to arrive at the appropriate sentence (337 U.S. at 247):

> "A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of of the fullest information possible concerning the defendant's life and characteristics."

The need for this information is well recognized by state courts and commentators. See *People* v. *Tompkins*, 112 Ill.App.2d 251, 251 N.E.2d 75 (3d Dist. 1969); Note, *Procedural Due Process at Judicial Sentencing For Felony*, 81 Harv.L.Rev. 821 (1968).

Concomitantly, the defendant and his counsel customarily are permitted to present evidence in mitigation. In *Mempa* v. *Rhay*, 389 U.S. 128 (1967), this Court recognized that

substantial rights of a defendant are affected at the sentencing and therefore there is a constitutional right to counsel at that stage (389 U.S. at 135):

> "... the necessity for the aid of counsel in marshalling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent."

The importance of giving the defendant an opportunity to present mitigating evidence is recognized by statute throughout the United States. See Note, *Sentencing, Probation, and the Rehabilitative Ideal: The View From Mempa v. Rhay*, 47 Texas L. Rev. 1, 10 fn. 42 (1968). Ill.Rev.Stat. 1971, ch. 38, § 1-7(g) and (o). Rule 32(a) of the Federal Rules of Criminal Procedure explicitly provides that the defendant shall have an opportunity "to make a statement in his own behalf and to present any information in mitigation of punishment." See *Green* v. *United States*, 365 U.S. 301 (1961).

The sentencing judge needs to have relevant information at resentencing, as is involved in the instant case, as well as at the original sentencing. *Braun* v. *Rhay*, 416 F.2d 1055 (9th Cir. 1969). This is especially true since the defendant's conduct during the time between the original sentence and the resentencing may be highly germane to intelligent and socially useful disposition of the offender. See Ill.Rev.Stat. 1971, ch. 38, §1-7(o).

In *Braun* v. *Rhay*, 416 F.2d 1055, 1058 (9 Cir. 1969), the court held that a defendant was entitled to counsel at resentencing even though the trial court had no choice but to impose the maximum sentence required by law.

While this Court has not explicitly decided the matter, it appears that affirmative denial of the opportunity to be heard on the issue of sentence constitutes a denial of due

process. In *Hill* v. *United States*, 368 U.S. 424 (1962), rehearing denied 368 U.S. 424 (1962), this Court held that there was no constitutional error in the trial judge's failure to ask the defendant if he desired to speak before imposition of sentence (368 U.S. at 428):

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional or constitutional."

However, this Court carefully noted that the defendant was not affirmatively denied the right to speak (368 U.S. at 429):

> "It is to be noted that we are not dealing with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether §2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider."

The affirmative denial to petitioner of his attempt to present substantial evidence highly relevant to sentencing constitutes "aggravating circumstances" as envisioned in *Hill* and rises to the level of constitutional error. Compare *Specht* v. *Patterson*, 386 U.S. 605, 606 (1967); *Stevens* v. *Warden, Maryland Penitentiary*, 238 F.Supp. 334, 338 (D. Md. 1965), aff'd 382 F.2d 429, (4th Cir. 1967), cert. denied, 390 U.S. 1031 (1968).

Petitioner's contentions are similar in spirit to the principles set forth in *Morrissey* v. *Brewer*, (No. 71-5103 June 29, 1972), 40 U.S. L.W. 5016, recently decided by this Court. In *Morrissey*, this Court set forth the minimum requirements of due process in a state's revocation of parole. This Court held (40 U.S.L.W. at 5021):

> "There must be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority. . . . The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that *circumstances in mitigation* suggest the violation does not warrant revocation." (emphasis added)

If a parolee is to be afforded the significant due process requirements announced in *Morrissey*, certainly a defendant in a sentencing proceeding deserves the minimal due process safeguards sought in this petition. A parolee, as does petitioner, comes before a tribunal after original sentencing and is to be heard on an issue involving, in part, his conduct in the intervening period.

In the instant case, for example, at the hearing after remand, which the Appellate Court expressly voided, evidence was presented which was not available at the hearing on aggravation and mitigation held shortly after the trial five years earlier. The evidence was highly relevant to the resentencing. Petitioner had voluntarily withdrawn his name from the roll of attorneys, had not practiced law since his conviction, and had lived a law abiding life. The court was also able to consider the arrangements for restitution made by petitioner. The state presented evidence in aggravation. In short, the court was presented with a

fair summary of all relevant circumstances essential in a reimposition of sentence five years after the original sentence.

The consequences of a full and fair hearing were evident, for the same trial judge presiding at the original hearing was now persuaded to impose a sentence lighter than that originally imposed. It was a violation of due process for the Appellate Court subsequently to avoid this hearing and to reinstate the original more severe sentence. This ruling amounts to a rejection of the essential underlying requirements of fairness in the sentencing process.

Furthermore, due process was violated when the trial court refused to consider all sentencing alternatives available under state law. Probation was a recognized disposition of a criminal defendant under statutory law as then existing. Ill.Rev.Stat., 1967, ch. 38, §117-1. To forbid the petitioner from attempting to persuade the court to grant him probation is as much a violation of due process as forbidding the petitioner from attempting to persuade the court to enter a lighter sentence.

The disposition of petitioner in this case is manifestly unjust. Petitioner and the state presented evidence in aggravation and mitigation, the same trial judge considered the ample new evidence which had developed since the imposition of the original sentence, and imposed a lighter sentence. The Appellate Court's affirmative denial of petitioner's right to be heard and reimposition *sua sponte* of the original sentence amounts to a denial of due process of law.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to grant his petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

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Appellate Court of Illinois First District

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

VERNON J. KNOX,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County
Honorable Thomas H. Fitzgerald, Presiding.

Gen. No. 54118 — December 1, 1971

MR. JUSTICE BERMAN delivered the opinion of the court.

This cause comes up for the second time on appeal. In *People* v. *Knox,* 90 Ill. App. 2d 149, 234 N.E. 2d 128, this court reviewed defendant's conviction of larceny, for which he was sentenced to a term of two to five years in the penitentiary, and found that, on the evidence, defendant had been proved guilty beyond a reasonable doubt, but that the trial court had erred in not holding a hearing on the voluntariness of two statements made by defendant prior to trial. This court then remanded the cause, directing the trial court to hold a hearing on the voluntariness of the statements, and if it found that they were voluntarily made, to sentence the defendant in accordance with the verdict of the jury.

The trial court conducted the requisite hearing and found that the statements were voluntarily given. It denied the defendant's motion to suppress and entered a new judgment. The defendant then moved to be admitted to probation. The court denied the motion, stating, "I have no authority to give this man probation. * * * I have no authority as I understand the law to do it. The mandate of the Appellate Court being what it is." The court then proceeded to hear evidence in aggravation and mitigation and sentenced the defendant to a term of one to four years in the penitentiary. It is from this sentence that the defendant appeals.

Defendant's sole contention is that the trial court, in reconsidering the sentence on remand, erred in refusing to exercise its statutory authority to grant him probation. We believe, however, that the trial court on remand was without authority to reconsider the sentence, and hence also without authority to grant him probation.

It is well settled that "where a cause is re-docketed after litigation is prosecuted to a court of review and passed upon, not only the questions that were raised and considered, but also all that could have been raised and passed upon, are *res judicata* whether they were raised or not." *Village of Oak Park* v. *Swigart*, 266 Ill. 60, 61, 107 N. E. 158, 159. Whether defendant was entitled to probation was a question which could have been raised and passed upon in the initial appeal. It is too late in the proceedings for him to raise it now for the first time.

The rule of law is that when a cause is remanded with special directions, those directions must be followed, and the trial court may take only such proceedings as conform to the judgment of the Appellate Court. *Thomas* v. *Durchslag*, 410 Ill. 363, 102 N. E. 2d 114. In the instant case,

the Appellate Court remanded the cause with the following directions:

> This case is therefore remanded with directions to the trial court to vacate the judgment of conviction and conduct a hearing in accordance with this opinion.
>
> If the court finds that the statements of the defendant were made involuntarily the trial court shall grant the defendant a new trial. If the court finds that the statements were made voluntarily by the defendant the court shall enter a new judgment and sentence in accordance with the verdict of the jury. *People* v. *Knox*, 90 Ill. App. 2d 149, 167, 234 N. E. 2d 128, 136.

It is clear that the Appellate Court mandate empowered the trial court solely to rule on the voluntariness of the two statements, and if it found the statements were voluntarily made, to enter a new judgment and to reinstate the original sentence of two to five years.

The trial court erred in holding a hearing on aggravation and mitigation and in changing the sentence previously imposed on defendant. Consequently, the conviction is affirmed, the resentencing of defendant to a term of one to four years is reversed, and the original sentence of two to five years is reinstated.

AFFIRMED IN PART
AND
REVERSED IN PART.

ADESKO, P.J., and DIERINGER, J., concur.

The opinion of the Appellate Court in an earlier appeal in this case, (Gen. No. 50,630, December 15, 1967) is not directly involved. Pursuant to instructions from the Clerk, a copy of that opinion has been lodged with the Clerk.

Judgments, Decrees and Orders on Rehearing

Appellate Court of Illinois, First District, General No. 50630 Placita, December 15, 1967—

This cause is remanded to the Circuit Court of Cook County with directions to vacate the judgment of conviction and conduct a hearing in accordance with the opinion of this Court this day filed herein.

If the Circuit Court of Cook County finds that the statements of the defendant were made involuntarily, the Circuit Court of Cook County shall grant the defendant a new trial. If the Circuit Court of Cook County finds that the statements were made voluntarily by the defendant, the Circuit Court of Cook County shall enter a new judgment and sentence in accordance with the verdict of the jury.

Appellate Court of Illinois, First District, General No. 54118 Placita, December 1, 1971—

That part of the judgment of the Circuit Court of Cook County relating to the conviction of defendant is affirmed. The resentencing of defendant to a term of one to four years is reversed and the original sentence of two to five years in the Illinois State Penitentiary is reinstated.

Appellate Court of Illinois, First District, General No. 54118 January 5, 1972—

Motion for rehearing denied.

Supreme Court of Illinois, No. 44988 — Placita, March 29, 1972 — Petition for leave to appeal from Appellate Court, First District, General No. 54118

And now on this day the Court having duly considered the petition for leave to appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a leave to appeal herein.

/s/ *Justin Taft*

Supreme Court of Illinois — No. 44988 — May 11, 1972—

Petition for reconsideration of order denying petition for leave to appeal "denied".